
CANADA / JUDGMENT

R. v. Heffernan

2017 BCSC 2628

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Heffernan,

2017 BCSC 2628

Date: 20170510

Docket: X078511

Registry: New Westminster

Regina

v.

Alycia Heffernan

Before: The Honourable Mr. Justice A. Saunders

Oral Reasons for Judgment on Voir Dire #1 and #2

Counsel for the Crown:

H. Doherty

C. Coulsen

Counsel for the Accused:

J. Waddington

Place and Dates of Trial/Hearing:

New Westminster, B.C.

February 6-7 and April 10-13, 2017

Place and Date of Judgment:

New Westminster, B.C.

May 10, 2017

- [1] The accused is charged with three counts of unlawful possession of narcotics for the purpose of trafficking. The indictment originally included firearms charges as well, which the Crown has not proceeded with.
- [2] These are my rulings on two voir dieres. The first is as to the admissibility of results of a vehicle search, a search of the accused's person, and a statement given by the accused, all following what the Crown contends to have been the arrest of the accused on April 24, 2014, which are challenged on the basis of alleged breaches of the accused's rights under Sections 8 and 9 of the Charter.
- [3] The second voir dire is as to the voluntariness of the accused's statement made on April 25, 2014.
- [4] On the first voir dire, the Crown called evidence from three RCMP constables. Constables Burleigh and Sidhu participated in the takedown of the accused and a second person, a male, in an underground parkade in Surrey. Cst. Burleigh dealt with the accused at the scene. Cst. Sidhu was one of two officers who then searched the vehicle. The other officer who participated in the search was Constable Koftinoff, who had also taken part in the takedown. Cst. Koftinoff did not testify on either voir dire; I was told by Crown counsel that he suffers from PTSD and has resigned from the force.
- [5] The accused argues there were insufficient grounds to arrest her prior to the search; that at law, the takedown of the accused prior to the search only constituted a detention; and that the warrantless vehicle search was not incidental to arrest and was therefore invalid.
- [6] Some minutes before the takedown was initiated, a plainclothes RCMP officer, Constable Oakley, had observed a vehicle - a Ford Escape - and its occupants, a male driver, a male passenger and a female passenger, in an above-ground parking lot located across the street from the aforementioned underground parkade. In particular, he had seen the driver of the vehicle, a Caucasian male, exit the driver's door, crouch down for a few minutes, as if he was looking for something under the seat, and then move to the rear hatchback of the vehicle where he removed a handgun from a "man bag" he was wearing, placing it in a storage compartment in the trunk.
- [7] The male, as he was doing this, was looking around constantly to see if anyone was watching him. His behaviour was obviously suspicious, and his handling of the handgun was not in accordance with legal requirements.

- [8] Cst. Oakley, who testified on the voir dire, made a radio report of the situation, asking for assistance. He observed the vehicle and its occupants as they left the above-ground parking lot, drove across the street and entered the underground parkade.
- [9] A number of uniformed officers then arrived on the scene in patrol cars. They met together and discussed their plan of action. They understood, from radio calls, that they were dealing with a handgun in a vehicle driven by a male, with a male and a female passenger. They had a description of the vehicle and its licence plate number. It was regarded by them as an urgent, high-risk situation.
- [10] The parkade was searched, and the vehicle was located on a lower floor, reverse-parked in a stall. The three officers - Csts. Burleigh, Sidhu and Koftinoff - approached with their weapons drawn; Burleigh and Sidhu were carrying their sidearms, and Koftinoff was carrying a pump action shotgun. As they approached, Burleigh and Sidhu observed the vehicle's headlights flashing. Their view of the passenger compartment was obscured by a concrete pillar. Cst. Burleigh then saw a male standing at the front left fender, that is at the driver's side, and he then observed the accused emerge from behind the pillar, walking towards the front of the car, on the passenger side.
- [11] Cst. Burleigh ordered the accused to approach him. She was compliant. He turned her around, told her she was being investigated for possession of a firearm, handcuffed her, and walked her towards one of the police cars, seating her in the rear.
- [12] I infer that the male was arrested by Cst. Koftinoff.
- [13] Cst. Sidhu then proceeded with what he understood to be a search of the vehicle, incidental to arrest.
- [14] I find that based on the observations of Cst. Oakley and the information relayed by radio, there were reasonable grounds for the attending officers to believe the accused had committed the indictable offence of having been the occupant of a motor vehicle in which she knew there was a firearm, contrary to s. 94(1) of the Criminal Code. The arrest without warrant was justified. Although the accused and the male were not actually seen by the officers to have exited the vehicle, the police officers' testimony, which I accept, was that given the configuration of the parkade, the position of the vehicle and the distance from other vehicles, this was the only vehicle they reasonably could have been thought to have come from.
- [15] The officers' belief in there being reasonable grounds to arrest was not mitigated by the fact that there were only two persons on the scene, rather than the three occupants of the vehicle that had been seen by Cst. Oakley. That discrepancy could easily have been accounted for by the gap in time between Cst. Oakley having lost sight of the vehicle when it went into the parkade, and the takedown. It was simply a fact that required explanation, without detracting from the apparent connection between the two persons and the vehicle.

- [16] Cst. Burleigh testified, as I have stated, that he told the accused only that she was being investigated. He did not explicitly state she was being arrested, prior to the search. He testified that he did not arrest her right away and merely detained her, because he was unsure of her role. Nevertheless, a de facto arrest of the accused did occur through the handcuffing of the accused and placing her in the police vehicle. While Cst. Burleigh did not have a subjective belief that he was arresting the accused, he did have subjective knowledge of factors constituting reasonable grounds upon which an arrest could be made, which is the subjective component required under s. 495 of the Criminal Code. Those grounds for arrest are also established on an objective test view of the circumstances. Furthermore, it was apparent to Cst. Sidhu, who participated in the vehicle search, that an arrest of both the female and the male had occurred; notwithstanding Cst. Burleigh's subjective state of mind, Cst. Sidhu had a subjective, and an objectively reasonable understanding that arrests had been made, and he was therefore in the circumstances entitled to proceed with a search incidental to arrest.
- [17] I therefore find no breach of the accused's section 8 and 9 Charter rights. The fruits of the arrest - the vehicle search, and, subject to my findings on the second voir dire, the accused's statement - are admissible.
- [18] My second ruling is as to the voluntariness of the accused's statement given on April 25, 2014. The statement, made to Constable Davie, who testified, was recorded with a video camera, and was audio recorded on a separate device.
- [19] The background to Cst. Davie's involvement is that she was present in the detachment that evening when the accused was brought in. Procedures called for the accused, a female, to be strip-searched by a female officer, and so Cst. Davie was asked to conduct the search. She took custody of the accused from Cst. Koftinoff, and passed her back to Cst. Koftinoff's care following the search.
- [20] The next day, Cst. Davie was told by her supervisor Constable MacDonnell that the accused had asked to speak to the police. Cst. Davie was asked to conduct the interview as she had dealt with the accused the previous evening. Cst. Davie testified that she was and is not aware whom the accused had spoken to, indicating that she wanted to make a statement, or what was said, or how long that exchange took.
- [21] Prior to taking the statement, Cst. Davie informed the accused that she did not have to have to make a statement; the accused nodded, indicating that she understood. Cst. Davie confirmed with her that she had spoken with counsel. The video recording clearly documents Cst. Davie stating that she wants to make sure that nobody had made the accused any threats or promises or anything like that while in custody, and the accused confirmed this was the case.
- [22] From the video of the statement, the accused appeared animated and engaged in her conversation with Cst. Davie. There was some twitchy, nervous behaviour on her part such as touching her hair and wrinkling her nose, but no signs of apprehension, at least no more

than would be usual in such circumstances. Everything about the exchange appeared to me completely matter-of-fact, with the accused showing no signs whatsoever of being in distress or even distracted. She made mention at one point that she had not slept for "like a day and a half", and that her back pain was bad; however, despite those statements there was no obvious sign of distress in any way.

- [23] No out-of-court statement made to a person in authority is admissible without proof of it having been made voluntarily. The onus is on the Crown to satisfy the trial judge of voluntariness beyond a reasonable doubt: see *R. v. Oickle*, 2000 SCC 38. It has been observed that as this is essentially a negative proposition, the Crown bears a heavy burden of producing evidence of all circumstances that may have been relevant to the making of the statement: see *R. v. Albrecht* (1966-7), 49 C.R. 314 (N.B.S.C.A.D.) at p. 325. There is no absolute rule requiring evidence to be given by every person in authority with whom the accused had contact - each case depends on its facts: see *R. v. Barreda*, [1999] B.C.J. No. 2259 (S.C.), at para 12; and *R. v. Menezes*, [2001] O.J. No. 3758 (S.C.J.), at para. 19. The usual procedure to be followed by the Crown is as described by in the majority judgment in *Erven v. The Queen*, [1979] 1 S.C.R. 926 [Erven], at p. 931:

Accepting that a burden rests upon the Crown to show affirmatively that the statement sought to be introduced was voluntary, how does the Crown go about discharging that burden? In my experience, the usual procedure has been for the Crown, before adverting to the statement, to request the trial judge to retire the jury. In the absence of the jury the Crown calls witnesses, normally the police officers to whom the statement was made or given, and any other police officers who might have been in a position to threaten or to offer hope of advantage to the accused.

This process permits the trial judge to have the necessary appreciation of the surrounding circumstances, all of which must be investigated on the voir dire: *Erven*, at p. 936.

- [24] One permissible exception to this usual practice is that the Crown may have a satisfactory explanation for the testimony of a particular police witness not being called. The genesis of this exception would appear to be the decision of Duff C.J.C. in *R. v. Thiffault*, [1933] S.C.R. 509, [1933] 3 D.L.R. 591, where he said, at para. 14:

This judgment [*R. v. Sankey* [1927] S.C.R. 436, at 440-1] was applied, and rightly applied we think, by the Court of Appeal for Ontario in *Rex v. Seabrooke* [(1932) 58 C.C. 323.]. It results from this statement of the law that the determination of any question raised as to the voluntary character of a statement by the accused elicited by interrogatories administered by the police is not a mere matter of discretion for the trial judge, as the court below appears to have thought. Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused; and, where the statement professes to give the substance of a report or oral answers given by the accused to interrogatories, without reproducing the questions, then the written

report ought to be admitted in evidence unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.

[Emphasis added]

- [25] In my view the rationale for this exception is simply that evidence of other surrounding circumstances may negate any potential for reasonable doubt arising from the absence of otherwise relevant testimony. Again, there is no hard-and-fast rule as to what may constitute an adequate explanation; whether a reasonable doubt arises from the gap in the evidence will necessarily depend on the potential relevance of the missing officer's testimony and the reason offered for it not being called.
- [26] As I have noted, Cst. Koftinoff did not testify. He was obviously a key actor in terms of police interaction with the accused. He was one of the three officers who participated in the takedown, him having been armed with a shotgun. It appears from Cst. Burleigh's testimony that it was Cst. Koftinoff who formally arrested the accused. It appears likely that it was he who transported her from the scene of the arrest to the detachment, giving him the opportunity to interact with her. There may have been other opportunities for substantial interaction at the detachment prior to handing her off to Cst. Davie for the strip search, and after the accused was transferred back into his custody. Cst. Koftinoff ought to have testified on the voir dire to give positive evidence of the absence of any promises, inducements or threats.
- [27] As I have also noted, some explanation was offered by the Crown as to Cst. Koftinoff's absence - his having been diagnosed with PTSD and having resigned from the force. The Crown does not deny the potential relevance of the constable's testimony. If it is the law that such a medical excuse may be properly advanced to excuse the resulting gap in the evidence - which seems doubtful to me, given the potential importance of his testimony - I would not regard a simple explanation for his absence, offered by counsel, as sufficient. No medical evidence was tendered as to the constable not being able to testify or as to his being subpoenaed potentially being harmful to his wellbeing. I do not regard absence as having been adequately explained.
- [28] I find the absence of testimony from Cst. Koftinoff leaves a gap in the evidence that raises a reasonable doubt as to voluntariness. That doubt is not overcome by the accused's presentation on the videotaped statement.
- [29] Furthermore, even if that constable's absence could be seen as excusable, that would still leave a further significant evidentiary gap in the Crown's case in terms of proving the circumstances under which the accused made known to the police her decision to give a statement. There is no evidence whatsoever as to how that came about - whether it was a spontaneous decision made of her own free will, or whether it resulted from conversations with police officers or other circumstances of her detention. On that fact alone, even if Cst. Koftinoff had testified, I would find that the Crown has not discharged its onus to lead evidence as to the surrounding circumstances.

[30] I therefore find that the voluntariness of the statement has not been proven beyond a reasonable doubt, and it will not be admitted into evidence.

"A. Saunders J."

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